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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

CORDALE LINER,

Defendant and Appellant.

B282346

(Los Angeles County  
Super. Ct. No. BA431962)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald S. Coen, Judge. Affirmed and remanded for further proceedings.

Tanya Dellaca, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Robert M. Snider, Deputy Attorneys General, for Plaintiff and Respondent.

Cordale Liner was convicted by jury on one count of assault with a firearm. (Pen. Code, § 245, subd. (a)(2)).<sup>1</sup> The jury also found true allegations that appellant personally used a firearm (§ 12022.5, subd. (a)) and inflicted great bodily injury (§ 12022.7). Appellant’s sole contention on appeal is that the case must be remanded to the trial court for it to exercise its discretion under section 12022.5, subdivision (c), as amended by Senate Bill No. 620 (SB 620) effective January 1, 2018, whether to strike the section 12022.5 enhancement. We agree with appellant and remand for the trial court to exercise its discretion.

## **FACTUAL AND PROCEDURAL BACKGROUND**

On December 3, 2014, Quinn Jackson saw appellant, Clyde Joseph, Robmeca Dozier, and several others arguing in a parking lot at Associated Technical College, where they were students. Jackson was watching from the window of the third floor stairwell in a nearby building.

Appellant had been arguing with Cristyle Spencer, who was appellant’s girlfriend and Joseph’s cousin. Joseph intervened, telling appellant, “Don’t talk to her that way.” Appellant and Joseph began arguing, and Joseph removed his backpack in preparation for a fight. Dozier and Spencer restrained Joseph. As appellant began walking away, Joseph threatened to beat him up.

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<sup>1</sup> Unspecified statutory references will be to the Penal Code.

Appellant withdrew a gun, but pointed it at the ground and appeared to give Joseph a warning. After Dozier and Spencer released Joseph, appellant aimed the gun at Joseph's leg and shot him in the hip. Appellant attempted to shoot two or three more times, but the gun jammed.

Appellant was charged with four counts of assault with a deadly weapon, but the prosecution dismissed two of the charges. The jury convicted him of one count. The court sentenced appellant to the upper term of four years, plus consecutive terms of four years for the firearm enhancement and three years for the great bodily injury enhancement, for a total of 11 years.

## **DISCUSSION**

Appellant contends the case must be remanded for reconsideration of his firearm enhancement pursuant to SB 620, which amended section 12022.5, subdivision (c) to give the trial court discretion to strike a section 12022.5 enhancement when the law became effective on January 1, 2018.<sup>2</sup> Respondent concedes that the new legislation applies retroactively to appellant's case but contends that remand is not required because the record clearly shows the trial court would not have struck the enhancement if it had had the discretion at the time of

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<sup>2</sup> Amended section 12022.5, subdivision (c) provides: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law."

sentencing. We disagree and therefore remand for the trial court to exercise its discretion.

As has been established by a line of case authority dealing with SB 620, remand to allow the trial court to exercise its discretion whether to strike a section 12022.5 enhancement “is required unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so. [Citation.] Without such a clear indication of a trial court’s intent, remand is required when the trial court is unaware of its sentencing choices.” (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110 (*Almanza*).)

Respondent contends the record clearly indicates the trial court would not have struck the enhancement, arguing that the trial court sentenced appellant to the upper term on the base count and “observed that appellant was on probation in three matters when he committed the crime.” This is not a clear indication of the trial court’s intent regarding the firearm enhancement.

“Under . . . section 12022.5, subdivision (a), the trial court in this case had discretion to impose a 3-, 4-, or 10-year prison term for the firearm enhancement.” (*People v. McVey* (2018) 24 Cal.App.5th 405, 419 (*McVey*).)

The trial court here explained the reason for the sentence as follows: “Initially, I note that the defendant is statutorily ineligible for probation pursuant to the dictates of . . . section 1203 subdivision (e)[(2) and (e)(3)], and I do not find this to be an unusual case where the interest of justice would mandate the granting of probation, and for that

reason probation is denied.<sup>[3]</sup> [¶] In selecting the term, the defendant is on probation for three matters at the time of the commission of this offense, albeit misdemeanors, and that warrants the high term as to the base term on [the assault count]. [¶] As to [that count], . . . defendant is sentenced to the state prison for the high term of four years for the reasons I have indicated. [¶] Pursuant to . . . section 12022.5 subdivision (a), the court selects the mid-term of four years consecutive. [¶] And pursuant to . . . section 12022.7 subdivision (a), the defendant is levied a term of three years in state prison, for a total unstayed term of 11 years.”

The court’s statement thus indicates the reason for imposing the high term on the base count, but the court selected only the mid term for the firearm enhancement. Unlike *McVey*, in which the trial court “identified several aggravating factors, including the lack of significant provocation, appellant’s disposition for violence, his lack of any remorse, and his ‘callous reaction’ after shooting an unarmed homeless man six or seven times” in choosing the 10-year firearm enhancement (*McVey*, *supra*, 24 Cal.App.5th at p. 419), the record here does not reflect such a litany of aggravating factors in connection with the firearm enhancement.

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<sup>3</sup> The statute provides: “Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any of the following persons [¶] . . . [¶] (2) Any person who used, or attempted to use, a deadly weapon upon a human being in connection with the perpetration of the crime of which he or she has been convicted. [¶] (3) Any person who willfully inflicted great bodily injury or torture in the perpetration of the crime of which he or she has been convicted.” (§ 1203, subd. (e)(2) & (3).)

We therefore conclude that a remand is appropriate. The court’s comments at the sentencing hearing do not permit us to conclude categorically that the court would not exercise its discretion under section 12022.5, subdivision (c) to strike the subdivision (a) enhancement. (See *Almanza, supra*, 24 Cal.App.5th at pp. 1110-1111 [remanding for the trial court to exercise its discretion on whether to strike or dismiss a firearm enhancement, explaining that “speculation about what a trial court might do on remand is not ‘clearly indicated’ by considering only the original sentence”]; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 427–428 (*McDaniels*) [“remand is proper because the record contains no clear indication of an intent by the trial court not to strike one or more of the firearm enhancements”]; cf. *McVey, supra*, 24 Cal.App.5th at p. 419 [“In light of the trial court’s express consideration of the factors in aggravation and mitigation, its pointed comments on the record, and its deliberate choice of the highest possible term for the firearm enhancement, there appears no possibility that, if the case were remanded, the trial court would exercise its discretion to strike the enhancement altogether”].) “While we express no opinion on how the court should exercise its discretion on remand, that discretion is for it to exercise in the first instance.” (*McDaniels, supra*, 22 Cal.App.5th at p. 428.)

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## **DISPOSITION**

The matter is remanded for the trial court to exercise its discretion under section 12022.5, subdivision (c). In all other respects the judgment is affirmed.

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WILLHITE, J.

We concur:

MANELLA, P. J.

COLLINS, J.